In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-940

VINCENT PACELLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admission, without a limiting instruction, of a post-arrest statement of a co-conspirator inculpating petitioner in a narcotics distribution conspiracy, where the co-conspirator testified at the trial and denied both making the statement and its accuracy. Petitioner also challenges the admissibility of certain evidence seized in the course of a search pursuant to a valid search warrant, where the evidence seized was not described in the warrant.

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner and one Demetrios Papadakos were found guilty of having conspired to distribute controlled narcotics; petitioner was also convicted on three substantive counts charging possession of controlled substances with intent to distribute and use of a telephone in the course of their dis-

tribution (21 U.S.C. 812, 841, 846). He was sentenced to a total of twenty years' imprisonment and a $10,000 fine. The court of appeals affirmed (Pet. App. 1a-11a).

At trial, a co-conspirator (Elisa Possas) who had pleaded guilty was called as a government witness. She denied that petitioner or Papadakos was her source of narcotics; she also repudiated the veracity of a signed statement given to narcotics agents shortly after her arrest, in which she had identified petitioner and his co-defendant as her sources of supply.[1] Thereafter, the government introduced the content of the statement through the testimony of a narcotics agent. No instruction was given limiting the use to which the statement could be put by the jury. Petitioner contends that the use of the prior inconsistent statement in these circumstances violated his rights. He also contends that the seizure of a container of boric acid, a diluent of cocaine, from his fiancee's apartment, pursuant to a search warrant specifying only heroin as the object of the search, was invalid. These contentions are properly answered in the opinion below, on which we principally rely (Pet. App. 3a-9a).

2. With respect to the admissibility of Possas' out-of-court statement, petitioner concedes that her in-court testimony eliminates any basis for a claim that his Sixth Amendment right of confrontation was violated (Pet. 14). Instead, he seeks to pour the old wine of the Confrontation Clause arguments rejected by this Court in *Nelson* v. *O'Neil*, 402 U.S. 622, and *California* v. *Green*, 399 U. S. 149, into the new bottle of the Due Process Clause. However, petitioner has not adduced any claims of unfair-

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[1]The interrogation resulting in the statement was preceded by a warning conforming to the requirements of *Miranda* v. *Arizona*, 384 U.S. 436. The waiver-of-rights form and Possas' signed statement are reproduced at Pet. App. 12a and 13a.

ness inhering in the admission of such statements that were not considered and rejected in *Green*, and then again in *O'Neil*. In both of those cases, the Court concluded that the availability of the witness at trial and his opportunity to explain in detail the reasons why the earlier statement was incorrect or misleading provided the jury with a sufficient basis to evaluate the trial testimony against the extra-judicial statement and to arrive at a conclusion as to which version reflected the truth. See 399 U.S. at 159; 402 U.S. at 628-629.[2] In this connection, petitioner's citation of the concurring opinion of Justice Harlan in *Dutton* v. *Evans*, 400 U.S. 74, 98 (see Pet. 20), to establish a broader Due Process claim is taken out of context; the quote came in the course of a discussion of *Douglas* v. *Alabama*, 380 U.S. 415, and *Bruton* v. *United States*, 391 U.S. 123, both of which involved situations in which the utterer of the extra-judicial statement was not available for cross-examination at trial.

Petitioner suggests that the reasoning of *Green* should not be applicable here because of the circumstances in which the statement was made (Pet. 14, n. 9). But this Court anticipated and dealt with such a contention in its opinion in *Green* (399 U.S. at 168):

> In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part

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[2]The Court touched on the due process argument in a footnote in *Green*, stating that due process considerations "might prevent convictions where a reliable evidentiary basis is totally lacking," but suggesting that otherwise there could be no constitutional objection apart from that which may be raised under the Confrontation Clause (399 U.S. at 163-164, n. 15). This is not a case in which "a reliable evidentiary basis [for conviction] is totally lacking."

> It makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, offhand remark to a stranger, and the carefully recorded testimony at a prior hearing.

It is thus clear that there are no constitutional objections to admission of the prior inconsistent statement for all purposes. Petitioner asserts, however, that the general federal rule of evidence restricting use of prior statements to impeachment should be invoked to reverse the conviction for failure to give a limiting instruction.[3] The court of appeals held that this failure was erroneous under its rule that only sworn out-of-court statements may be admitted for all purposes, but found that the error was harmless beyond a reasonable doubt in light of the other evidence duplicating the contents of the statement (Pet. App. 6a).[4] There is no reason to review this basically factual assessment.

3. With regard to the search question, we supplement the thorough discussion of the court of appeals (Pet. App.

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[3] Under the proposed Federal Rules of Evidence, prior inconsistent statements of a witness would be admissible for all purposes in federal courts (Rule 801(d)(1)).

[4] The "reasonable doubt" standard for concluding that the error was harmless was formulated in assessing the impact of error of a constitutional magnitude. See *Chapman* v. *California*, 386 U.S. 18, 26. For non-constitutional trial errors, such as hearsay violations, a less stringent standard would suffice. See Rule 52(a), Fed.R.Crim.P.

7a-9a) solely by pointing out that a number of other courts of appeals, even before this Court resolved the matter in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, 514-516, had held, consistently with the court below, that where law enforcement officials executing a search warrant inadvertently come across other evidence incriminating the accused, they may lawfully seize that evidence, even though it is not listed in the warrant. *E.g.*, *Gurleski* v. *United States*, 405 F. 2d 253, 256-260 (C.A. 5), certiorari denied, 395 U.S. 981; *Anglin* v. *Director, Patuxent Institution*, 439 F. 2d 1342, 1345-1349 (C.A. 4), certiorari denied, 404 U.S. 946; see also *United States* v. *Honore*, 450 F. 2d 31, 33 (C.A. 9), certiorari denied, 404 U.S. 1048 (decided after *Coolidge*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.